

**STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT**

**IN THE MATTER OF THE PROTEST OF
ROJO CONCRETE CONSTRUCTION
TO WARRANT OF LEVY ISSUED UNDER
LETTER ID NO. L1434808122**

D&O # 19-04

v.

Case Number 18.10-251L

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

A hearing on the above captioned protest occurred on December 17, 2018 before Ignacio V. Gallegos, Hearing Officer, in Santa Fe, New Mexico. Guadalupe Rojo, owner, appeared on behalf of Rojo Concrete Construction (“Taxpayer”), accompanied by his daughter, Destiny Rojo, who assisted Mr. Rojo with translation from English to Spanish and Spanish to English¹. The Taxation and Revenue Department (“Department”) was represented by Mr. Richard Perner, Staff Attorney. Guadalupe Rojo appeared as the sole witness for the Taxpayer. Nicholas Pacheco, Protest Auditor, appeared as the witness for the Department.

Taxpayer presented no additional exhibits. The Department’s Exhibits A-1 through A-6, B-3, C-1, D-1 through D-5, and F-1 were admitted without objection. The Hearing Officer took administrative notice of all documents contained in the administrative file. All exhibits are more fully described in the Administrative Exhibit Log.

The main issue presented before this tribunal in this protest is whether the Department lawfully executed collections against a bank account held by Taxpayer. After making findings of fact in this matter and discussing the arguments and the pertinent legal authority in more detail, this tribunal ultimately

¹ Mr. Rojo’s understanding of English as a second language appeared to the hearing officer very proficient. Mr. Rojo gave statements in English, answered questions in English, and read through documents in English. The assistance of a contemporaneous translation service were made available, but Mr. Rojo declined using the service. Mr. Rojo’s daughter Destiny is fluent in both English and Spanish and she proved to be very helpful in translating when called upon by Mr. Rojo in instances in which Mr. Rojo’s English proficiency faltered.

concludes/rules that the Department prevails in this matter, as the Taxpayer was unable to show that a payment plan was in force at the time to justify a stay of the levy, or to demonstrate that the funds in his bank account were the property of another.

FINDINGS OF FACT

1. On July 24, 2018, the Department printed a Warrant of Levy letter to Wells Fargo Bank. The letter was served on July 25, 2018. [Department exhibit A-1 through A-4, Letter ID #L1434808112, Testimony of Mr. Pacheco, HR 1:15:00-1:18:30].
2. The Warrant of Levy after having been printed, was altered slightly, to reflect additional interest and penalty, as well as deduction for a payment made between the date of printing and the date of service, reducing the total due from Taxpayer from \$62,925.76 to \$62,832.08, a difference of \$93.68. [Department exhibit A-1 through A-4, Letter ID #L1434808112, Testimony of Mr. Pacheco, HR 1:16:00-1:18:30, HR 1:30:10-1:32:00].
3. The Warrant of Levy contained a list of tax assessments, with associated penalties and interest, for various tax periods between October 1, 2010 and May 31, 2017. [Department exhibit A-1 through A-4].
4. On July 30, 2018, Wells Fargo Bank issued a cashier's check, and on July 31, 2018 remitted payment to the Department of \$18,607.95 from the account it held for Rojo Concrete Construction. [Department Exhibit A-5 and A-6].
5. On July 30, 2018, Guadalupe Rojo submitted a formal protest letter. In the protest letter, Taxpayer asserted that he had been defrauded into believing that a payment plan was in place. The protest letter was stamped as received by the Department protest office on July 31, 2018. [Administrative file].
6. On August 6, 2018, the Department acknowledged receipt of the formal protest. [Letter ID # L0736468784].

7. On October 9, 2018, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a scheduling conference hearing, alleging the amount in controversy of \$18,607.95. [Administrative File].

8. On October 9, 2018, the Administrative Hearings Office issued the Notice of Telephonic Scheduling Hearing, setting this matter for October 25, 2018, within 90 days of the Department's receipt of the protest. [Administrative file].

9. On October 25, 2018, the undersigned Hearing Officer conducted a telephonic scheduling hearing. Guadalupe Rojo appeared for Taxpayer, accompanied by his daughter Destiny Rojo. Richard Pener, staff attorney appeared representing the Department. The scheduling hearing was held a total of 86 days from when the protest was acknowledged by the Department. [Administrative file].

10. On October 25, 2018 the Administrative Hearings Office issued a Scheduling Order and Notice of Administrative Hearing, setting this matter for a merits hearing on December 17, 2018, in Santa Fe, New Mexico.

11. On December 17, 2018, a hearing was held at the Administrative Hearings Office, in the Wendell Chino Building, Suite 269, in Santa Fe, New Mexico, and testimony and exhibits were entered.

12. Mr. Guadalupe Rojo is the sole proprietor of Rojo Concrete Construction. He works providing concrete construction services in and around Artesia, New Mexico. [Testimony of Mr. Rojo, HR 13:00- 13:30, HR 28:00-28:50].

13. Mr. Rojo acknowledged the validity of the underlying debt. [Testimony of Mr. Rojo, HR 15:00-16:00, HR: 26:00-27:00,].

14. The Wells Fargo bank account that issued the levied funds was Mr. Rojo's account. He had the right to money in the account. [Testimony of Mr. Rojo, HR 27:00-27:50, HR 31:15-32:40].

15. Mr. Rojo was approached by Clear Creek, a tax consulting firm, to help him with his taxes in 2017. Mr. Rojo hired Clear Creek in October of 2017 and paid approximately \$5,000 to Clear Creek with the goal of initiating tax payment plans for Internal Revenue Service (IRS) debt and New

Mexico tax debt. Clear Creek required \$2500 to start looking at his case, and another \$2500 after their review, because it was what they called a very difficult case. By December of 2017, he had paid the total of \$5,000 to Clear Creek. [Testimony of Mr. Rojo, HR 22:30-23:30, HR 38:45-41:00].

16. Mr. Rojo communicated with Clear Creek several times and was unhappy with the progress they made. The Clear Creek agent asked for bank statements, which Mr. Rojo provided, and informed Mr. Rojo that they were working on setting up a payment plan. They never informed Mr. Rojo that a plan was in place or provided documentation. [Testimony of Mr. Rojo, HR 41:00-42:00].

17. Mr. Pacheco, as protest auditor, reviewed the Rojo Concrete Construction file. He took note that the file contained some contact from Clear Creek from October to December of 2017, but he noted that no formal installment agreement had been achieved. [Testimony of Mr. Pacheco, HR 1:33:20-1:34:45].

18. On advice of a friend, in February of 2018, Mr. Rojo hired someone named "Sylvia" who held herself out to be an accountant. He paid her approximately \$3,800 to establish a payment plan for the state tax debts. His payments were made in cash, starting with a payment of \$800. Sylvia would call Mr. Rojo and tell him she needed \$300 or \$400. She claimed that the documentation she was getting from the state cost 25¢ per page. He would meet her in Roswell, or at his work site. She only gave him one handwritten receipt on a piece of paper for one of the payments he made. [Testimony of Mr. Rojo, HR 18:00-19:00, 20:00-21:00, HR 23:20-23:40, HR 35:30-36:15, HR 38:20-38:40, HR 42:15-48:15].

19. In one instance, "Sylvia" asked for a Walgreens rechargeable gift card to make a payment to the state, which Mr. Rojo purchased. She told him that he had a payment plan, but was unable to provide the papers. Afterwards, Mr. Rojo attempted to contact "Sylvia" but was unable to do so. [Testimony of Mr. Rojo, HR 20:00-21:40; Exhibit B].

20. Mr. Pacheco noted that there was no authorization in the file allowing "Sylvia" access to Mr. Rojo's business account information, and there is no record that she took any action on his behalf to establish a payment plan. [Testimony of Mr. Pacheco, HR 1:34:30-1:35:20].

21. Mr. Rojo had previously been on payment plans with the Department. The first was on March 30, 2011. That plan terminated when Mr. Rojo was unable to make scheduled payments. Mr. Rojo was aware the plan had been terminated. [Testimony of Mr. Rojo, HR 51:15-54:50, Exhibit C-1].

22. Mr. Rojo entered into a second payment plan on July 17, 2013. That plan terminated when Mr. Rojo was unable to make scheduled payments. Mr. Rojo was aware the plan had been terminated. [Testimony of Mr. Rojo, HR 54:50-1:00:00, Exhibit D-1].

23. Mr. Rojo contacted Victoria Gonzales at the Department's office in Roswell, New Mexico in July of 2017. Mr. Rojo understood that to enter into another payment plan he would have to provide a down payment of 25% of the outstanding balance, which was beyond his means. [Testimony of Mr. Rojo, HR 48:15-50:20].

24. It is Department policy to require a taxpayer to make a lump sum payment in advance of entering into an installment agreement. [Testimony of Mr. Pacheco, HR 1:35:20-1:36:00].

25. Once Mr. Rojo received the Final Notice Before Seizure letter from the Department, he went to speak with Victoria Gonzales again to inquire why it was so much. At that time, he was unable to enter into an installment agreement. [Testimony of Mr. Rojo, HR 1:01:45-1:03:30, HR 1:12:00-1:13:00, Exhibit D-4]

26. Mr. Rojo had been hired for a concrete construction job, and the money he deposited into his account in July of 2018 he intended to use to pay for materials and labor. He considered the money in his account as belonging to others to pay for a septic tank and other materials. This was the reason for his protest, to see if the Department could return some of it to help him pay others. [Testimony of Mr. Rojo, HR 14:30-15:00, 26:45-27:15, HR 33:00-34:20]

DISCUSSION

The sole issue in this protest is whether to Taxpayer is entitled to a refund of some portion of the money withdrawn from his business account pursuant to tax levy. Mr. Rojo acknowledged the validity of the tax debt, and simply wishes to pay the people he owes.

Burden of Proof.

Under NMSA 1978, Section 7-1-17 (C), the underlying assessments of tax issued in this case are presumed correct. Unless otherwise specified, for the purposes of the Tax Administration Act, “tax” is defined to include interest and civil penalty. *See* NMSA 1978, Section 7-1-3 (Y). Under Regulation 3.1.6.13 NMAC, the presumption of correctness under Section 7-1-17 (C) extends to the Department’s assessment of penalty and interest. Therefore, the Taxpayer has the burden to overcome the assessment and show he was entitled to an abatement of tax. *See Archuleta v. O’Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 504 P.2d 638.

Levies.

Once a taxpayer has become delinquent, as defined by NMSA 1978, Section 7-1-16 (2013), the Department may lawfully collect the debt. The Department may collect taxes owed by a delinquent taxpayer by levy on all property of the taxpayer. *See* NMSA 1978, Section 7-1-31 (2015). A taxpayer is delinquent if any assessment made against the taxpayer is not protested or paid in full within 90 days of the assessment. *See* NMSA 1978, Section 7-1-16 (2013). The Taxpayer did not protest the underlying tax assessments, and a significant balance remained outstanding significantly longer than 90-days from the date of the latest assessment.

Levies are required to meet certain criteria in order to be valid on their face. *See* NMSA 1978, Section 7-1-32 (2015). The warrant of levy in this case, including its attached schedule, appears to satisfy all the criteria outlined by Section 7-1-32. The warrant of levy was valid.

Once served, the financial institution must execute the levy. In this instance, Wells Fargo received notice of the levy on July 25, 2018, and complied with the requirements of Regulation 3.1.10.9 NMAC by surrendering the property held by that banking institution which were the property of Mr. Rojo.

Taxpayer knew he had been assessed for tax periods ranging from 2010 through 2017. Mr. Rojo was aware that he had not paid the assessments in full. Mr. Rojo recalled receiving the “Final Notice Before Seizure” letter dated June 18, 2018. Mr. Rojo did not dispute the validity of the underlying tax or

that he was a delinquent taxpayer at the time of the levy in July 2018. Consequently, the warrant of levy was properly executed on the Taxpayer's accounts.

Payment plans.

The Taxpayer suggested that he commenced the process for obtaining a payment plan when he communicated with the Department through various agents, beginning in October of 2017. Mr. Rojo had entered into other installment agreements with the Department. He first entered an installment payment plan in 2011. He defaulted on that plan, and was aware it was no longer in effect. Mr. Rojo entered into a second installment agreement in July of 2013. Again, Mr. Rojo defaulted on the plan, and was aware that the plan terminated. Mr. Rojo attempted to enter another installment agreement in 2017, but was informed that he would have put 25% of his outstanding balance as a down payment.

Installment agreements must be made in writing and must require monthly installment payments. *See* NMSA 1978, Section 7-1-21 (A) (2017). When the Department enters into an installment agreement with a taxpayer, "no further attempts to enforce payment of the tax by levy or injunction shall be made". NMSA 1978, Section 7-1-21 (E) (2017). However, if the taxpayer defaults by failing to make payments "on or before the times specified in the agreement" or by failing to meet "any condition contained in the agreement," the Department "may proceed to enforce collection of the tax as if the agreement had not been made." *Id.*

After defaulting on the first two installment agreements, the Taxpayer never entered into a third written installment agreement with the Department. Although the Taxpayer understood that Clear Creek was "working on it," he never obtained written documentation of successful completion. And, although "Sylvia" took his money, the Department records were void of any attempts made by "Sylvia" and Mr. Rojo had nothing to show for her alleged efforts. Despite Taxpayer's paying nearly \$9,000.00 to third parties with the goal of establishing a payment plan with the Department, a written installment agreement

was never executed and the Taxpayer was not making monthly installment payments. Therefore, the Department was free to enforce collection by levy.

Equitable relief.

Mr. Rojo understood that the Department was justified in taking the action it ultimately took to collect from his business's bank account. However, he asked that the Hearing Officer grant equitable relief in the form of refunding half of the money taken from his account, so that he could pay the people he owed money to: Southwest Redi-Mix and Morales Backhoe Service.

Here the Taxpayer requested that the Hearing Officer order a refund on the theory that the money was due to someone else. This is a request for imposition of the equitable relief associated with a constructive trust. "A constructive trust is a legal fiction, an equitable remedy devised to prevent unjust enrichment and compel restitution of property that in equity and good conscience does not belong to the Defendant." *Acheff v. Lazare*, 2014 U.S. Dist. LEXIS 31563, 2014 WL 894491 (D. New Mex. Jan. 29, 2014) (internal quotation marks omitted) (citing *U.S. v. Andrews*, 530 F.3d 1232 (10th Cir. 2008)). The Administrative Hearings Office has not been granted statutory authority to exercise the equitable remedy the Taxpayer seeks. See NMSA 1978, Section 7-1B-1, *et seq.* See also *AA Oilfield Serv. v. N.M. State Corp. Comm'n*, 1994-NMSC-085, ¶ 18, 118 N.M. 273 (holding that the quasi-judicial powers of an administrative body did not empower it to grant equitable relief, such as estoppel, because the authority is limited to making factual and legal determinations as authorized by the statute). Historically, the Administrative Hearings Office addresses all theories of recovery and error presented. Some theories involve equitable considerations, but the hearing officer may only address an equitable theory as determined by statute. See NMSA 1978, Section 7-1-28 (F) (equitable recoupment), Section 7-1-17.1 (relief for an innocent spouse), Section 7-1-60 (estoppel). The relief of creating a constructive trust is not one which has been statutorily authorized under the Tax Administration Act. See NMSA 1978, Section 7-1-1 *et seq.*

Here, although Mr. Rojo appears to have a cause of action against “Sylvia” for her deceptive conduct, there is no indication that the Department engaged in any fraud, constructive fraud, duress, undue influence, breach of fiduciary duty, or other wrongful conduct. *See Madrid v. Rodriguez (In re Estate of Duran)*, 2003-NMSC-008, ¶34, 133 N.M. 533. In this protest, the Mr. Rojo was honest and sympathetic, but the law and the evidence persuaded the Hearing Officer that the balance of substantial evidence supports the finding that the Department’s action was justified.

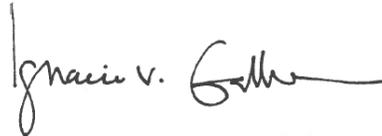
CONCLUSIONS OF LAW

- A. Taxpayer filed a timely, written protest to the Department’s execution of the warrant of levy, and jurisdiction lies over the parties and the subject matter of this protest.
- B. A hearing was timely held within 90-days of protest under NMSA 1978, Section 7-1B-8 (2015).
- C. Taxpayer’s evidence did not overcome the presumption of correctness that attached to the underlying assessments under NMSA 1978, Section 7-1-17 (C) (2007) and *Archuleta v. O’Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 504 P.2d 638.
- D. Taxpayer was a delinquent taxpayer, after defaulting on the first and second payment plans, and the Department was able to enforce collection by levy. *See* NMSA 1978, Section 7-1-31.
- E. Taxpayer’s evidence of efforts to enter into a new payment plans failed to overcome the Department’s determination that he was a delinquent taxpayer under NMSA 1978, Section 7-1-16 (2013) and the Department was not prohibited from collecting the debt. *See* NMSA 1978, Section 7-1-21 (2017).
- F. The warrant of levy satisfied the statutory requirements and was properly served to the financial institution. *See* NMSA 1978, Section 7-1-32 (2015).
- G. The Department properly executed a seizure by levy against the funds held by Taxpayer, under NMSA 1978, Section 7-1-31 (2015), and the financial institution acted in accordance with Section 7-1-31(2015) and Section 7-1-34 (1993) and Regulation 3.1.10.9 NMAC by remitting the funds.

H. Interest continues to accrue on tax still owed by Taxpayer. *See* NMSA 1978, Section 7-1-67 (2013).

For the foregoing reasons, the Taxpayer's protest **IS DENIED**.

Dated: January 24, 2019.

A handwritten signature in black ink that reads "Ignacio V. Gallegos". The signature is written in a cursive style with a long horizontal stroke at the end.

Ignacio V. Gallegos
Hearing Officer
Administrative Hearings Office
Post Office Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record proper with the Court of Appeals, which occurs within 14-days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.

CERTIFICATE OF SERVICE

I hereby certify that I mailed the foregoing Decision and Order to the parties listed below this 24th day of January, 2019 in the following manner:

First Class Mail

Interdepartmental State Mail

INTENTIONALLY BLANK

John D. Griego
Legal Assistant
Administrative Hearings Office
Post Office Box 6400
Santa Fe, NM 87502
PH: (505)827-0466
FX: (505)827-9732